

## ORDER

**FINDINGS OF FACT**

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant has worked as a machinist for respondent for 16 years. On March 11, 2009, claimant was moved to a different job, working on deburring and boring machines. These machines required claimant handle parts weighing from 28 to 32 pounds on a regular basis. Claimant would load and unload from 25 to 28 parts per machine in an 8-hour shift. Claimant's prior job with respondent required he handle parts weighing from 7 to 10 pounds on a regular basis.

Claimant testified that the new job caused him to develop problems behind his shoulder blade, with tingling and numbness. Claimant acknowledged that he had these same symptoms in 2001 when he was using a mower at home, and again in 2003 when he was helping another person move a boat. Claimant sought medical treatment after both earlier incidents, but testified that he had fully recovered from those incidents. Medical reports from July 18, 2003, indicate claimant was diagnosed with cervical spondylosis, neck spasms and left upper extremity radiation. Claimant underwent a left subacromial bursa injection on August 8, 2003. Additional medical information from either 2001 or 2003 is not contained in this record.

Claimant was referred by respondent to board certified surgeon Paul S. Sandhu, M.D., for a medical evaluation on March 16, 2009. The history provided to Dr. Sandhu included claimant having to push and pull a foot pedal, which was described as being stuck, with both his hand and foot. Claimant denies telling Dr. Sandhu that he was pushing the pedal with his hand. The history also fails to discuss claimant handling weights from 28 to 32 pounds on a regular basis. At the preliminary hearing, claimant testified that the weights were a problem for his neck and left upper extremity. Dr. Sandhu expressed concern due to claimant being "drugged-up" and "slow to respond to questioning".<sup>1</sup> Claimant had a long history of migraine headaches, and was taking Valium, Diazepam, Amitriptyline, Tizanidine and Verapamil, all for the headaches. These medications were being prescribed by a Dr. Sandson from Tulsa, Oklahoma. Claimant testified that the work accident with respondent had no effect on his headaches.

Claimant was referred for x-rays, which showed degenerative disc disease which Dr. Sandhu stated would explain the shoulder and neck pain and the radiating pain into the arms bilaterally. However, Dr. Sandhu then stated that he did not believe claimant's neck problem was related to his work for respondent. He also expressed concern that with all the medications claimant was using, he would respond inappropriately at work, including kicking, pulling and pushing, which he stated claimant did. Dr. Sandhu recommended that

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<sup>1</sup> P.H. Trans., Resp. Ex. 1.

claimant be moved to another work area due to the medications claimant was taking. Dr. Sandhu also provided restrictions limiting claimant to 10 pounds lifting.

Claimant did not tell respondent of the problems on the first day. Instead, the next day, he talked to Steve Erbe, the union representative, and later told Jack Kerns, respondent's director of safety and health. When respondent conducted an investigation, they found the foot pedal to work properly. Claimant continued to allege that the pedal was not working properly. At one point, respondent asked claimant to demonstrate the use of the pedal and noted that claimant tended to kick the pedal rather than push the pedal as was intended. An internal investigation report indicated claimant was kicking the pedal instead of inserting his foot and operating the pedal properly.<sup>2</sup> Claimant's meetings with respondent and the investigations involved claimant, Mr. Kerns, Mr. Erbe and Neal Edwinston, respondent's current labor relations manager. Respondent determined that claimant was falsifying the claim, apparently in order to claim a non-work injury as a work-related injury. After reaching this conclusion, respondent suspended claimant without pay for 30 days. During one meeting, it is alleged that claimant offered to drop the claim if the 30-day suspension was dropped. Claimant denies this, and also denies telling Mr. Edwinston that the injury was non-work related.

A cervical spine MRI on March 27, 2009, displayed mild C4-5, C5-6 and C6-7 central canal stenosis and mild left C5-6 and C6-7 neural foraminal stenosis. The degenerative disc space narrowing and disc dehydration were most severe at C5-6 and C6-7 and lesser at C4-5. Cervical spine films, taken by Dr. Smith in July 2003, displayed straightening of the cervical lordosis with degenerative changes at C5-6 and C6-7. Claimant also underwent nerve conduction studies on April 13, 2009, which displayed left ulnar entrapment neuropathy below claimant's left elbow.

Claimant was examined by Jay L. Bryngelson, M.D., on a referral by Dr. West on April 28, 2009. Dr. Bryngelson released claimant with no restrictions, but cautioned that it would be ideal if claimant could be accommodated.

Claimant was referred by his attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., for an examination on May 8, 2009. Dr. Prostic was provided a history of past left shoulder problems from which claimant healed completely, but was not told of claimant's ongoing migraine headaches. He was told of claimant's use of the foot pedal while holding parts weighing up to 28 pounds. Claimant was diagnosed with left shoulder rotator cuff difficulties, loss of range of motion in the cervical spine and possible cubital tunnel syndrome. Claimant was prescribed anti-inflammatory medication and physical therapy for his left shoulder. The diagnosed conditions were determined to have been caused during his employment with respondent.

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<sup>2</sup> P.H. Trans., Resp. Ex. 2.

**PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>3</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>4</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>5</sup>

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."<sup>6</sup>

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.<sup>7</sup>

The medical reports in this record are conflicting. None of the physicians appears to have been given a complete recitation of claimant's job duties nor his past and current problems. However, it appears that claimant was moved to a different job, with significantly

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<sup>3</sup> K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

<sup>4</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>5</sup> K.S.A. 2008 Supp. 44-501(a).

<sup>6</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

<sup>7</sup> *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

heavier weights to contend with. The dispute involving the foot pedal, while disconcerting, does not negate the probability that claimant aggravated his preexisting cervical and left shoulder problems on this new job. This Board Member finds that claimant has satisfied his burden of proving that he suffered an accidental injury which arose out of and in the course of his employment with respondent. The May 18, 2009, Order of the ALJ is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>8</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

#### **CONCLUSIONS**

Claimant has satisfied his burden of proving that he suffered an accidental injury which arose out of and in the course of his employment with respondent. The Order of the ALJ is, therefore, affirmed.

#### **DECISION**

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Thomas Klein dated May 18, 2009, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August, 2009.

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HONORABLE GARY M. KORTE

c: William L. Phalen, Attorney for Claimant  
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier  
Thomas Klein, Administrative Law Judge

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<sup>8</sup> K.S.A. 44-534a.